SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Miscellaneous No. 77-947

DONALD E. BORDENKIRCHER, SUPERINTENDENT, KENTUCKY STATE PENITENTIARY — **PETITIONER**

V.

JOHN RANDOLPH GASTON — **RESPONDENT**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JOHN RANDOLPH GASTON — **RESPONDENT**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Donald E. Bordenkircher, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit consisted of an order granting the respondent's motion to affirm the judgment below. The judgment and order is not reported but is

set out in full in Appendix, page 41a. Neither the judgment nor the opinion of the United States District Court which was affirmed by the United States Court of Appeals is reported, however both are set out in full in the Appendix, pages 35a-40a.

The United States Court of Appeals for the Sixth Circuit entered an order permitting the name of Donald E. Bordenkircher to be substituted for the name of Henry E. Cowan. Donald E. Bordenkircher has replaced Henry E. Cowan as Superintendent of the Kentucky State Penitentiary

JURISDICTION

The judgment and order of the United States Court of Appeals for the Sixth Circuit was entered on the fifth day of October, 1977. This petition for a writ of certiorari was filed within ninety days of that date. Under 28 U.S.C. § 1254(1) this Court has jurisdiction to review the judgment below.

QUESTIONS PRESENTED

I. WHETHER THE COMMONWEALTH IS PROHIBITED FROM ENCOURAGING A DEFENDANT TO ENTER A PLEA OF GUILTY BY THREATENING AT THE PLEA BARGAINING SESSION TO BRING A SECOND INDICTMENT CHARGING ADDITIONAL CRIMES.

II. WHETHER PROOF THAT THE COMMONWEALTH DELIBERATELY UNDERCHARGED IN THE ORIGINAL INDICTMENT SO THAT BAIL WOULD BE SET LOWER REBUTS A PRESUMPTION OF VINDICTIVENESS.

NOTICE

The decision below was based in significant part on *Hayes v. Cowan,* 547 F.2d 42 (6th Cir, 1976), cert. granted sub nom *Bordenkircher v. Hayes,* No. 76-1334, —— U.S —— June 6, 1977). A reversal Of *Hayes,* id. Would dispose of the issues raised in the case at bar. On the other hand, an affirmance would not do so.

Hayes, supra, was argued before this Court on November 9, 1977.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION,
FIFTH AMENDMENT:

"No person shall be held to answer for a capital or other wise infamous crime, unless on a presentment or indictment of a grant jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, § ONE:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment and order wherein that court affirmed the judgment of the United States District Court for the Western District of Kentucky granting the respondent's application for writ of habeas corpus.

II. DECISION OF THE COURT BELOW.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court after determining that the district court did not abuse its discretion in deciding that the prosecutor's practice of obtaining habitual criminal indictments against defendants who refused to plea bargain and insist on going to trial was in violation of *Hayes*, supra. In *Hayes* the Court of Appeals for the Sixth Circuit held that the Due Process Clause of the 14th Amendment to the United States Constitution was violated when the prosecutor unjustifiably placed the defendant in fear of retaliatory action after he had refused to plead guilty to an indictment charging a substantive offense and insisted on his right to trial.

In granting the motion to affirm in this case, the United States Court of Appeal for the Sixth Circuit adopted the decision of the United States District Court for the Western District of Kentucky holding that the case was on "all fours" with *Hayes*, supra, except for the evidence concerning the policy of the Commonwealth Attorney's Office not to indict under the habitual criminal statute until it became obvious that trial was unavoidable. The district court indicated in its opinion that the evidence showed that the Commonwealth Attorney's Office had adopted the policy at the request of the Jefferson County Defense Bar so that bail would be set at a lesser amount and enable the defendants to consult more freely with their attorneys about their defense. The court said:

"*** While the testimony offered by Mr. O'Connor

might be the basis for the belief that the policy of the Commonwealth Attorney's Office was not vindictive, the holding in *Hayes,* supra and the language used on page 5 of the Opinion would seem to warrant a decision that the policy of the Commonwealth Attorney's office was unconstitutional .... Also, as in *Hayes, supra* there is no indication that the prosecutor, had he thought such an indictment proper, could not have included the habitual criminal charges in the original indictment." Appendix, pages 38a & 39a.

III. COURSE OF THE PROCEEDINGS.

John Randolph Gaston, respondent, filed an application for a writ of habeas corpus in the United States District Court for the Western District of Kentucky claiming among other things that the plea bargaining process denied him his constitutional rights in that it was oppressive and coercive. After considering the application and this petitioner's return to show cause order, the district court entered a judgment denying the application. The decision was appealed to the United States Court of Appeals for the Sixth Circuit which vacated the judgment and remanded the case to the district court to make a determination as to whether the prosecutor threatened Gaston with seeking an indictment under the habitual criminal statute as was the case in *Hayes,* supra.

In accordance with the Order of the United States Court of Appeals for the Sixth Circuit, the district court set an evidentiary hearing wherein trial counsel for Gas-

States Court of Appeals for the Sixth Circuit in *Hayes*

ton, Rose Shipp, testified that she attended a pre-trial conference regarding her client's indictments. Appendix, pp. 6a & 7a. She testified that she discussed the case with Mr. O'Connor, who was the Assistant Commonwealth Attorney prosecuting the case. She said that Mr. O'Connor inquired whether Gaston was willing to enter a plea of guilty in return for a recommendation of the Commonwealth. Mrs. Shipp indicated that Gaston was not willing to accept the plea because he was not guilty of the charges. Mrs. Shipp then testified at that point that Mr. O'Connor said ". . . we'll go out and get date for trial and I am going to have a habitual criminal indictment broughtt down." Appendix, page 7a. The plea bargaining session was held on the twelfth day of October, 1973. Appendix, page 6a. Mrs. Shipp testified that she had known about the Commonwealth's position prior to the plea bargaining session and that she had previously advised Gaston as to the consequence of a decision to enter a plea of not guilty. Appendix, page 7a.

Edward O'Connor, the Assistant Commonwealth's Attorney who prosecuted Gaston in the Jefferson Circuit Court, explained the offer made at the plea bargaining session. Gaston was arrested in Jefferson County on several charges of illegal sale of heroin. At the time of his arrest he was released on probation. Revocation of his probation would result in his serving a ten year sentence. In return for a plea of guilty for illegal sale of heroin, the prosecutor offered to recommend that the ten year sentence for which Gaston was already convicted be revoked and that Gaston be placed on probation on the new plea of guilty. Under the recommendation, Gaston's

probation would be revoked. Gaston would be eligible however for parole after serving one year of the ten year sentence. As to the new sentence Gaston would be placed on probation, and he would not be required to serve time in the penitentiary so long as he did not violate the conditions. This was the offered recommendation which Gaston and his trial counsel rejected at the plea bargaining session. Appendix, pages 14a, 17a, 18a.

Mr. O'Connor explained why the Commonwealth Attorney's Office had changed its policy of indicting under the habitual criminal statute at the same time as the principle offense. His testimony was as follows:

> " . . . the practice in the Commonwealth Attorney's office was to indict everybody that was eligible as a habitual at the time they were taken to the grand jury originally; in other words, if they were habitual candidates, we indicted them initially.
>
> Well, because of the meeting with the defense attorneys and Academy of Justice and everybody else, they were complaining that our office . . .
>
> MS. KING: Object. Your Honor.
>
> THE COURT: I'm going to let it go in for this time. Go ahead.
>
> MR. O'CONNOR: The reason that our office quit doing it initially is that the defense bar complained when they were indicted as habitual. *At the outset, the judges would set the bonds much higher and they couldn't get their clients out of jail; and they*

considered that a real grievance." (Emphasis added).

Appendix, pages 15a & 16a.

Since the Commonwealth Attorney's Office no longer indicted under the habitual criminal statute at the outset, the practice was to advise the defense counsel at the plea bargaining session that the client was eligible to be indicted as a habitual criminal. Appendix, pages 17a & 18a.

The prosecutor explained how he reached his decision to seek an indictment under the habitual criminal statute as follows:

> "It was my point to advise them initially before any plea negotiations at all and also they would know, but not to exercise a useless gesture until you were sure you were going to have to go to trial; and I don't—the Court can conclude any way they want to. I would just say it had nothing to do with the fact that he wouldn't take the offer. It had to do with in all cases that I handle that if it was going to be tried, I felt like probably the best practice was to do it initially, but because the office was accommodating the defense counsel as far as bonds, the next best thing we could do is just advise them at the outset what we were going to do and not connect that in any way with the plea bargaining." Appendix, page 19a.

The United States District Court after considering the evidence and briefs submitted by the parties granted the respondent's application for writ of habeas corpus.

On a motion by Gaston the United States Court of Appeals for the Sixth Circuit summarily affirmed this decision.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit has decided an important constitutional question which has not been, but should be, settled by this Court.

In *Santobello v. New York,* 404 U.S. 257, (1971), this Court recognized the wide spread use of "plea bargaining" and the fact that plea bargaining properly conducted is essential to the orderly administration of justice. This Court said:

> "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See *Brady v. United States*, 397 U.S. 742, 751-752.
>
> *Santobello,* supra, at 261.

In *Hayes*, supra, the United States Court of Appeals

for the Sixth Circuit held that the return of a second indictment charging a defendant not only with a principal offense but also with a violation of the habitual criminal or enhancement statute after the unsuccessful plea negotiations on the original indictment charging the defendant solely with the principal offense caused a strong inference or presumption of vindictiveness to arise. The only evidence offered by the Commonwealth was the defendant's prior criminal record. The court held that the prior criminal record was insufficient to rebut the presumption of vindictiveness. The court indicated that in order to rebut the presumption, the Commonwealth must rely on events occurring between the return of the original and second indictments. In *Hayes* the Commonwealth showed no events in this time period other than the defendant's insistence upon trial. The court held this showing was not enough. There was no explanation why the first indictment could not have contained the habitual criminal count. The court indicated, however, that the presumption would not arise when the prosecutor indicted for all charges in the original indictment.

In the case at bar, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court based upon its decision in *Hayes*, supra. While in *Hayes* the Sixth Circuit made severe enroads in the plea bargaining process, the decision here went even further. The Court of Appeals agreed with the district court that the evidence presented by the Commonwealth of Kentucky was insufficient to overcome the presumption of vindictiveness. The proof introduced by the Commonwealth showed that it had adopted the policy of not seeking an indictment on all charges (including

habitual criminal count) at the same time at the request of the Jefferson County Defense Bar. The defense bar wanted their defendants indicted solely on the principle offense so that bail would be set lower. The Commonwealth Attorney's office did not seek indictments charging habitual criminality until it became obvious that trial was unavoidable. It is this petitioner's position that there could never be a better explanation for the policy employed in the case at bar, and further that this evidence without question rebutted any possible presumption of vindictiveness on the part of the Office of the Commonwealth's Attorney. The judgment of the Court of Appeals has the effect in the instant case of saying that the presumpton of vindictiveness is virtually irrebuttable.

In a plea bargaining session both the state and the defendant make certain concessions. The prosecutor may agree to recommend a sentence, move for dismissal of certain counts in the indictment, or not seek additional indictments on other crimes which the defendant has committed. In return for the prosecutor's promise the defendant may agree to enter a plea of guilty to a certain count or counts in the indictment thereby relieving the prosecutor of the burden of proving the elements of the crime. If the plea bargaining session is successful the parties have struck a bargain. If a defendant enters a plea of guilty the prosecutor must perform his contractural obligation pursuant to the agreement reached at the plea bargaining session. *Santobello*, supra.

In *Brady v. United States*, 397 U.S. 742, 749 (1970), this Honorable Court recognized that it would be impossible for the prosecutor and the defendant to reach an

agreement in absence of some encouragement from the state. Nevertheless, this Court indicated in *Brady* that there were certain limits on the kind of encouragement the state can bring to bear on a defendant. The state cannot employ either actual or threatened physical harm. *Brady*, supra, at 750. It cannot employ mental corecion. *Brady*, supra, at 750. It cannot employ mental corecion. prosecution on charges not justified by the evidence. *Brady*, supra, at 751, footnote 8.

In neither the case at bar nor in *Hayes*, supra. did the Commonwealth of Kentucky physically harm the defendant to produce the guilty plea. The Commonwealth did not threaten physical harm, and did not threaten prosecution for additional crimes unjustified by the evidence. In both the case at bar and in *Hayes*, the prosecutor merely explained to the defendant and his lawyer that the defendant could be indicted under the habitual criminal statute and that he would seek such an indictment if he was required to go to trial in order to prove the elements of the principle offense charged in the original indictment. Admittedly this was coercion. But in absence of this kind of coercion, plea bargaining will cease to play a role in the administration of justice.

I.

ONLY THE TRIAL COURT HAS AUTHORITY TO DISMISS CHARGES BROUGHT IN THE INDICTMENT.

In *Hayes*, supra, pp. 44 & 45 the United States Court of Appeals for the Sixth Circuit held that the return of a second indictment charging the defendant

with recidivism after an unsuccessful plea bargaining session on the original indictment charging only the principle offense created a presumption of vindictiveness. In so holding, the court implied that such a presumption would not have been created had the Commonwealth brought all of the charges in the original indictment. When the prosecutor returns an original indictment charging only the principle offense and withholding the habitual criminal count and other crimes for use in the plea bargaining session, he can guarantee that the defendant will not be prosecuted for either recidivism or additional crimes. Such is not the case, however, when the prosecutor returns an indictment setting out all the charges against the defendant. In latter circumstance if the prosecutor were to make a representation that he could drop certain charges he would be violating the requirement of *Santobello,* supra, to bargain in good faith. Under Kentucky Rule of Criminal Procedure 9.64 the Commonwealth Attorney may move for dismissal of charges in an indictment but the ultimate decision is within the court's discretion. *Kidd v. Commonwealth,* 255 Ky. 498, 74 S.W.2d 944 (1934).

Surely the dictomy made by the Sixth Circuit in *Hayes,* supra, is not valid. Under this ruling a prosecutor acting in good faith is stripped of all viable options when he is required to "lay all of his cards on the table" before the plea bargaining session. By the same token, when the prosecutor returns an indictment including all charges, the defendant has few if any options available. Not many defendants will enter a plea of guilty to certain charges in an indictment leaving it to chance that

the trial court with knowldege of the defendant's prior criminal record will dismiss either a habitual criminal count or other remaining counts contained in the indictment.

II.

PLEA BARGAINING IS AN ADVERSARY STEP IN A CRIMINAL PROCEEDING.

In reaching its decision in *Hayes*, supra, the Sixth Circuit relied primarily on two cases handed down by this Court wherein it condemned vindictive practices by the court and the prosecutor. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court considered a case wherein a defendant after a successful appeal and reconviction was sentenced by the same judge to a greater punishment than he received at the first trial. This Court said " . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear. . . ." *Pearce*, at p. 726. This rule was designed to free a defendant who desires to appeal or file a collateral attack from apprehenson of a retaliatory move on the part of a sentencing judge. The reasons for increasing the sentence must be based upon conduct occurring after the original conviction.

In *Blackledge v. Perry*, 417 U.S. 21 (1974), this Court considered a case wherein the prosecutor returned an indictment charging the defendant with a felony based on the same conduct for which the defendant had previously been convicted of a misdemeanor. The pros-

ecutor obtained the indictment after the defendant filed an appeal from the misdemeanor conviction. This Court applied the principles espoused in *Pearce,* supra, saying "... a person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one." *Blackledge* at p. 28. Although there was no evidence of bad faith or maliciousness on the part of the prosecutor, a potential for vindictiveness nevertheless existed as in the of *Pearce,* supra.

A judge by virtue of his duties is required to be "a neutral and detached magistrate." In order to maintain this image the Court must always place in the record a basis for its actions. In *Blackledge,* supra, this Court for the first time applied the standard of a neutral and detached magistrate to a prosecutor. The role of the prosecutor had always been that of an adversary. This Court determined in *Blackledge* that the prosecutor should no longer be an adversary after obtaining a conviction and sentence. He should have no interest in punishing the defendant further.

On the other hand this Court recognized in *Brady,* supra, at 750 that the prosecutor has an interest "at every important step in the criminal process" in convicting the defendant and removing him as a threat to the public. As stated previously, this Court has said that in achieving his goal the prosecutor cannot threaten either physical harm or prosecution for a crime not justified by the evidence. However, this Court has never held that the prosecutor cannot coerce a plea of guilty

by threatening prosecution for a crime justified by the evidence. This was the situation both in the case at bar and in *Hayes*, supra.

Although the prosecutor may have no interest in punishing the defendant further following a trial and conviction, *Blackledge*, supra, he obviously has an interest in doing so before conviction. His duty is to prosecute a defendant for the crimes for which he stands charged. In both the case at bar and in *Hayes*, supra, this Court should determine the time at which the prosecutor must doff his armor and don his robe.

Neither *Pearce* nor *Blackldege* stands for the proposition that the prosecutor must wear the robes of a judge at an important step in the criminal process. In *United States v. Jamison*, 505 F.2d 407 (D.C.Cir., 1974) the Court reversed a first degree murder convition obtained after the defendant had been granted a mistrial on a second degree murder indictment. The defendant's trial counsel moved for a mistrial based on ineffective assistance of counsel. The Court's ruling on this motion could hardly be considered an important step in the criminal process. In *United States v. DeMarco*, 401 F.Supp. 505 (C.D.Cal., 1975). aff'd 550 F.2d 1224 (9th Cir., 1977). cert. denied No. 176-1671, —— U.S. —— (June 13, 1977), the Court refused to allow prosecution of an indictment obtained after a defendant asserted his right to a change of venue on a prior indictment charging less serious crimes. As in *Jamison*, it could hardly be said that the Court's ruling on a motion for change of venue was an important step in the criminal process. In *Jamison* and *DeMarco* the courts extend-

ed the rule in *Blackledge* from a post-trial stage to a trial stage in the former case and a pre-trial stage in the latter. Although both cases represent an unwarranted extension of *Blackledge,* it is nevertheless apparent that in neither case did the prosecutor nor the public have an interest in increasing the charges. In both cases the prosecutor acted as an adversary at a relatively unimportant stage of the criminal process. Furthermore, neither *Jamison* nor *DeMarco* dealt with plea bargaining. Consequently, neither is applicable to the case at bar.

In *United States v. Ruesga-Martinez.* 534 F.2d 1367 (9th Cir., 1976), the Court held that in absence of evidence justifying an increase in charges, a defendant cannot be tried on the increased charges after entering a plea of not guilty and refusing to waive trial by judge on a misdemeanor charge arising out of the same transaction. *Ruesga-Martinez* has no application to the case at bar or to *Hayes,* supra, because the magistrate who is required to act as a neutral and detached magistrate was the party responsible for the additional charges.

As stated earlier, this Court has recognized and sanctioned the rationale for plea bargaining. *Santobello,* supra. It is an important step in the criminal process. It is an adversary stage of the criminal proceeding at which the prosector should be permitted to encourage pleas of guilty. The Sixth Circuit's decision in *Hayes,* supra, and in the case at bar has stretched the holding in *Blackledge,* supra, so far as to say that the prosecutor must at all stages of a criminal

proceeding wear the robes of the judge. He is to doff forever his coat of armor.

III.

THE PROOF DOES NOT SHOW THAT THE PROSECUTOR REFUSED TO RENEW NEGOTIATIONS.

The Sixth Circuit lost sight of another factor both in *Hayes, supra,* and in the case at bar. In neither case did the defendant introduce proof that the Commonwealth refused to deal further after the second indictment was returned. The defendant had the option of renewing plea negotations up to the time of trial. Apendix page 21a.

IV.

BLACKLEDGE APPLIES ONLY TO CHARGING A HIGHER DEGREE OFFENSE.

The opinion of the Sixth Circuit in *Hayes,* supra. was based primarily on the rationale in *Blackledge,* supra. *Blackledge* was the first case extending the role of neutrality to the prosecutor. There the prosecutor increased the defendant's criminal liability by charging a higher degree offense. The same is true in *Jamison*

In *United States v. Mallah,* 503 F.2d 971 (2nd Cir., 1974), the Court reversed a case wherein the appellant Pacelli was convicted of distributing and possessing heroin. The appellant claimed he was originally charged with distributing and possessing cocaine and that the United States Attorney substituted the heroin charges

after appellant disclosed that the United States Attorney had promised a co-defendant immunity in return for testimony. The Court in disposing of this contention said:

> "This theory might have some force had the government, for example added to a previous charge of distributing narcotics in violation of 21 U.S.C. § 841 a charge of distributing that same narcotic to a minor in violation of 21 U.S.C. § 845. That is not the case here. It is one thing to increase a charge from manslaughter to murder and quite another to charge a defendant, subsequent to a successful appeal with a second murder. In the words of Williams, 'Pearce would have application, if a prosecutor . . . charged a defendant whose first conconviction had been set aside, with a more serious offense *based upon the same conduct.*' 436 F.2d at 105 (emphasis added). Here, the heroin counts are based upon acts which are distinct from charges previously brought against appellant. The government's decision to prosecute appellant for counts two and six is well within the traditionally broad ambit of prosecutorial discretion." p. 988.

In *Blackledge,* supra, the prosecutor charged the defendant with a higher degree offense. The prosecutor increased the charge vertically. See *Alschuler,* "The Prosecutor's Role in Plea Bargaining" 36 *Univ.* of *Chicago Law Review* 50, at pp. 85 & 86.

In order to prove the offense of habitual criminality it is necessary to prove only that the defendant was convicted of the principle offense, regardless of its nature.

KRS 431.190 It is not necessary to prove the elements of the principle offense. When as in the case at bar the prosecutor in a second indictment brings for the first time the charge of habitual criminality he has increased the charge horizontally not vertically. *Morgan v. Devine*, 37 U.S. 632 (1915). Since *Blackledge* applies only to verticle overcharging it has no application here.

V.

PROOF THAT THE COMMONWEALTH DELIBERATELY UNDERCHARGED IN THE ORIGINAL INDICTMENT SO THAT BAIL WOULD BE SET LOWER REBUTS THE PRESUMPTION OF VINDICTIVENESS.

In the case at bar the Sixth Circuit has gone further than its ruling in *Hayes*, supra. In *Hayes*, the court said that while the return of a second indictment charging the habitual criminal count following an unsuccessful plea bargaining session creates a presumption of vindictiveness, the presumption is nevertheless rebuttable. This petitioner cannot foresee a situation wherein the evidence to rebut vindictiveness could be stronger than here. Yet the Sixth Circuit held that the inference stood in the face of this evidence. The Sixth Circuit decision in this case renders the presumption of vindictiveness irrebuttable.

In *Hayes*, the prosecutor as part of his cross-exam-

ination at sentencing indicated that he previously informed the defendant that he would seek an indictment under the recidivist statute if he did not enter a plea of guilty and save him the inconvenience and time required in going to trial on the charges in chief. *Hayes,* supra, p. ——. footnote 2. The Sixth Circuit considered this as an admission of vindictiveness. *Hayes,* supra, at 45. In reaching its conclusion that *Hayes,* was denied due process of law by virtue of the plea bargaining session the Court said:

> ". . . In this case the prosecutor does not assert that any event occured between the issuance of the first indictment and the issuance of the second to influence his decision except petitioner's insistence upon his right to trial. There is no indication that the prosecutor, had he thought such an indictment proper, could not have included habitual criminal charges in the original indictment." *Hayes,* at 44.

In the case *sub judice* the evidence indicates that the extra time the prosecutor would necessarily have to spend on the case was not the sole reason for returning the second indictment charging criminality. He sought the indictment for two additional reasons: the charge was available due to the past record of the defendant and trial on the principle charge was unavoidable.

In *Hayes,* supra, the evidence indicated that the prosecutor thought the habitual criminal indictment was proper. On the other hand, in the case *sub judice* the evidence by the prosecutor shows that the Common-

wealth Attorney's Office felt that it was improper to obtain an indictment under the habitual criminal statute at the same time it obtained one on the substantive charges. To do so would cause bail to be set so high that it would be unavailable.

When the Sixth Circuit considered the case at bar for the first time, it concluded that there was nothing in the record to support a likelihood of vindictiveness. It therefore remanded the case to the District Court for further findings about the prosecutor' conduct in the pretrial plea negotiations and for further consideration consistent with *Hayes*, supra.

At the evidentiary hearing before the District Court, trial counsel for Gaston indicated that she was informed by the prosecutor that he would seek an indictment under the habitual criminal statute if Gaston did not enter a plea of guilty to the charge in chief. (App., 7a).

She received this information prior to the plea-bargaining session. (App., 7a). Defense counsel also testified that the prosecutor reiterated his offer at the plea-bargaining session when Gaston was present (App., 6a & 7a).

Although there was nothing in the record to raise a presumption of vindictiveness on the part of the prosecutor before the evidentiary hearing in the United Staates District Court, the petitioner concedes that the foregoing testimony does raise such a presumption. However, the petitioner offered testimony from Elward O'Conner, the prosecutor in the case at bar. His testimony rebuts any presumption of vindictiveness on the part of the Commonwealth's Attorney. Mr. O'Connor

testified that it had formerly been the practice of the Commonwealth Attorney's Office to indict on all charges including the habitual criminal charge at the same time. He further testified that because of a plea of the Jefferson County Defense Bar the Commonwealth Attorney's Office had re-examined its policy and decided not to seek an indictment on the habitual criminal statute unless it became apparent that trial was unavoidable. The Commonwealth Attorney's Office adopted this policy so that bail would be set at a lower rate and permit defendants to be released pending trial. Mr. O'Conner also stated that in the case at bar he did not seek an indictment under the habitual statute until it was determined for certain that trial was unavoidable. (App.,15a 16a, 19a).

In *Pearce*, supra the Supreme Court reversed but not without saying that the state failed to offer any evidence of justification at any stage of the habeas corpus proceeding. On the other hand. in the case at bar the Commonwealth of Kentucky has offered evidence to show that the conduct of the Commonwealth Attorney's Office was motivated by benevolence. The Commonwealth Attorney's Office did not indict under the habitual criminal statute at the outset so that a lower bail would be available for the defendant. This rebuts any inference of vindictive conduct.

The United States Court of Appeals for the Sixth Circuit upheld the decision of the District Court wherein it was held that the evidence failed to rebut the inference of vindictiveness. It was tantamount to holding that

the presumption of vindictiveness created by the *Hayes*, decision was not rebuttable.

CONCLUSION

This Court granted the application for writ of certiorari in *Hayes*, supra. The decision in the case at bar was made on the basis of *Hayes*. However, in affirming the decision below the Court of Appeals for the Sixth Circut went one step further. It held that the evidence offered by the Commonwealth of Kentucky was insufficient to rebutt the presumption of vindictiveness. The petitioner submits that the evidence offered by the Commonwealth more than rebutted the presumption and that the Sixth Circuit's holding was tantamount to labeling the presumption of vindictiveness irrebutable.

The petitioner submits that it is necessary for this Court to review the decision of the Court of Appeals for the Sixth Circuit wherein the Court obliterated the role of plea bargaining. If the decision of the Court of Appeals is permitted to stand the administration of criminal justice will be severely handicapped.

Respectfully submitted,

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PROOF OF SERVICE

I, George M. Geoghegan, Jr., Counsel for the Petitioner, hereby certify that three (3) copies of the foregoing brief were mailed, postage prepaid, to Hon. Kathleen C. King, Counsel for Respondent, 222 East Central Parkway, Cincinnati, Ohio 45202, this 29 day of December, 1977.

George M. Geoghegan Jr.

GEORGE M. GEOGHEGAN, JR.
ASSISTANT ATTORNEY GENERAL
Commonwealth of Kentucky

APPENDIX

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UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JOHN RANDOLPH GASTON, **Plaintiff** **V.** **HENRY E. COWAN, Superintendent of Kentucky State Penitentiary,** **Defendant**	**CIVIL NO 75-0268**

TRANSCRIPT OF EVIDENTIARY HEARING

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BEFORE HONORABLE CHARLES M. ALLEN UUNITED STATES DISTRICT JUDGE, WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE, KENTUCKY, ON THURSDAY, APRIL 21, 1977.

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APPEARANCES: *For the Plaintiff:*
Kathleen C. King
Cincinnati
Ohio

William Radigan
Frankfort
Kentucky

For the Defendant:
George Geoghegan, III
Capitol Office Bnilding
Frankfort, Kentucky

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THE CAPTIONED MATTER WAS CALLED IN OPEN COURT AT 1:30 P.M. ON THUURSDAY, APRIL 21, 1977, AND THE FOLLOWING PROCEEDINGS OCCURRED:

THE COURT: I beleive we are here today under mandate action of the Court of Appeals from the Sixth Circuit; and as I understand it, the only, the basic issue we are here today to try is whether or not the prosecution threatened the petitioner to relinquish a constitutional right when they - and whether or not they threatened to obtain a habitual criminal indictment when the petitioner refused to plead guilty to another charge. If that is correct, we will go forward.

Ms. KING: May it Please the court?

THE COURT: Yes.

MS. KING: Is the Court's opinion that Mr. Gaston has the burden of going forth with the appropriate evidence?

THE COURT: I belive that would be appropriate. The Court said, the Sixth Circuit said here that there had been no proof introduced other than Mr. Radigan's allegations which had been made; and, therefore, I believe the burden of proof would be on Mr. Radigan to sustain the thrust of his allegation.

MS. KING: Thank you, Your Honor. In that case,

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we are prepared to call Ms. Rose Shipp to the stand.

* * * * *

Shipp - Direct - King

ROSE SHIPP, called by the plaintiff and having been duly sworn, was questioned and testified, as follows:

MS. KING: Please state your name.

MS. SHIPP: My name is Rose Levada Shipp.

Q And where are you presently employed?

A I am an Assistant Commonwealth's Attorney, Thirtieth Judicial District, Louisville, Kentucky.

Q Directing your attention to 1973 during the months of October asd November, were you so employed?

A No, I was not. I was in private practice, and I did criminal defense work.

Q Did you have occasion to be employed by Mr. John Randolph Gaston?

A Yes, I did.

Q For what purpose was that, ma'am?

A I represented him in a legal capacity. I am a member of the Kentucky Bar; I am an attorney.

Q Did you represent him in regard to Indictment Number 150-096?

A Initially, yes.

Q And after that point in time, did you have occasion to represent him in regards to another indictment?

A Yes, I did.

Q Do you know the number of that indictment?

A 150-410.

Q Thank you. Directing your attention to on or about October 12, 1973, did you have occasion to go to a pre-trial in regard to Mr. Gaston's indictments?

A Yes, I did. I went to Jefferson Circuit Court, Criminal Branch, Division Number 1, on the 12th day of October, 1973. At that time, my client, Mr. John Gaston, was also present.

Q And what happened at the pre-trial?

A There was a meeting in one of the little anterooms from the court, and Mr. O'Connor, who was a Commonwealth Assistant Attorney at the time, came in; and I really can't state it verbatim, but what it was in

essence was he asked whether or not we were going to take the plea that they had offered; and Mr. Gaston was there, and I asked John again whether or not he wanted to; and he said, no, I am not guilty; I did do this, and then Mr. O'Connor in essence said, well, we'll go out and get date for trial, and I'm going to have a habitual criminal indictment brought down.

Q after that point in time, was a habitual criminal indictment brought down?

A Yes, it was. There was another arraignment, and that was Indictment Number 150-140, which was arranged on the 2nd day of November, 1973; and a trial date was set as the sme date as it was for the previous indictments os November 19.

Q Did you have occasion after the date of October 12, 1973,to further discuss this matter with your client, Mr. John Randolph Gaston?

A Let me say I knew about the Commonwealth's position, that they were going to seek a habitual criminal indictment in the event that my client did not plead to the charge prior to October 12, and I had told John about this, told him to think about it and what the consequences would be in the way of his penality; and I believe that this was a matter of about a week or so before October 12 date on which he came to court for that meeting.

Q How did you have occasion to know such a indictment would be filed?

A I was over in the court complex, and I don't re call the exact day. I do recall seeing Mr. O'Connor on the landing between the clerks' office and the stairway and the court, and he asked, or it was brought up whether or not John was going to plead; and I said, no, ten years is not acceptable. He did not do it, and he said, you know, it's going to mean the habitual down on him if he don't; and I said, well, I will just have to go with it.

Q When you referred to ten years, had that been a previous bargain that had been offered by Mr. O'Cosnor?

A Yes.

Q Is that the first time you heard anything, that meeting you just referred to, is that the first indication you had about the habitutal criminal indictment might be brought against Mr. Gaston?

A I believe it was.

Q And so that you did discuss this with Mr. Gaston, is that correct?

A Oh yes.

Q Ane he decided to go forward anyway?

A He said he was innocent.

Shipp—Cross—Geoghegaan—Dedirect—Kisg

MS. KING: I have no further questions at this time, Your Honor.

THE COURT: All right, cross-examine.

* * * * *

CROSS-EXAMINATION BY MR. GEOGHEGAN

MR. GEOGHEGAN: Ms. Shipp, did you know before October 12, 1976, that the Commonwealth was going to seek an indictment on the recidivist charge?

MS. SHIPP, Before 1976?
Q Before October 12, 1976 - 1973.
A Did I know before?

Q The pre-trial conference, the Commonwealth would seek a recidivist count on the indictment?

A If he did not plead

Q Yes.

A Yes. At that time, the little meeting we had in the hallway, yes.

MR. GEOGHEGAN: Thats all.

THE COURT: Anything further?

MS. KING: May it please the Court, just one other question.

THE COURT: Yes ma'am.

REDIRECT EXAMINATION BY MS. KING

MS. KING: Ms. Shipp, this meeting that you alluded to that was in the hallway, you had received prior to that time an offer of a deal of ten years, is that not correct?

MS. SHIPP: Oh yes.

MS. KING: Nothning further.

THE COURT: You may go, thank you.

MS. KING: Your Honor, at this point, I would like to call Mr. Gaston to the stand.

THE COURT: All right.

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Gaston - Direct - King

JOHN RANDOLPH GASTON, called by the

plaintiff and having been duly sworn, was questioned and testified as follows:

DIRECT EXAMINATION BY MS. KING

MS. KING Mr. Gaston, would you please state your name.

MR. GASTON John Randolph Gaston.

Q And where are you currently residing?

A Eddyville.

Q And why are you there, sir?

A For habitual criminal, selling narcotics.

Q Directing your attenion to October 12, 1973, do yourecall being in the courtroom as it was earlier testified?

A I can't recall.

O Do you recall any conversation with your attorney regarding habitual criminal?

A Yes.

Q Now what was that conservation that you had with your attorney?

A She came to the jail to see me and otld me the prosecutor told her, said if I didn't take the ten years, that he was going to bring the rabitual criminal charge, and I told him I told her I wasn't guilty of the charge. So when I went to court, I made bond first. I went to - back to the court on the charge, and the prosecuting attorney came in and told - came up to me and said he was going to get a habitual crinimal charge on me. So the Judge asked him, said do you have it down in writing; and he said, no, but I will. Give me . . .

THE COURT: Who said that?

MR. GASTON: The Judge asked the prosecuting attorney, do we have it down in writing about the habitual criminal; and he said, no, but I will. The Judge give me $50,000 bond and carried me back to jail.

MS. KING: Now your attorney in that case was Ms. Shipp?

A Yes.

Q And did she fully discuss with you all the implications of the habitual criminal being brought against you?

A Well, she said that the charges, you know about the indictment, they was going to try to crack down on me; and if I didn't plead guilty to the charge, he was going to give me a life sentence, habitual criminal.

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MS. KING: No further questions.

THE COURT: All right.

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MR. GEOGHEGAN: I have no questions.

THE COURT: All right, sir. Thank you, sir.

MS. KING: We rest, Your Honor.

THE COURT: All right. Mr. Geogheagan, do you have any witnesses?

MR. GEOGHEGAN: Your Honor, I would like to call Mr. O'Connor to the stand.

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EDWARD L. O'Connor, called by tre defendant and having been duly sworn, was questioned and testified, as follows:

DIRECT EXAMINATION BY MR. GEOGHEGAN

MR. GEOGHEGAN: What is your name, please?

MR. O'CONNOR: Edward L. O'Connor.

Q And by whom are you employed?

A I am employed as Assistant Commonwealth Attorney in the Thirtieth Judicial District, which is Jeffreson County.

Q How long have you been employed in that capacity?

A Approximately six years I beleive it is.

Q Do you recall prosecuting John Randolph Gaston in 1973 for violation of the Kentucky Controlled Substance Act?

A I do.

Q What was he charged with in the indictment?

A Well, the original indictment, he - what occurred is, on two seperate occasons, undercover police officers bought, allegedly bought heroin from him, as I recall it. About this time in 1972, the legislature had enacted a new Controlled Substances Act; but prior to that time you could be indicted if you possessed heroin and sold it, you could be indicted for possessisg it for purposes of sale and

selling selling it. It was two different offenses: but after the new law went into effect, it merged into one crime of traffic; and what happened in the original indictment, Jenny, a secretary to the grand jury, althougt the law was in effect, drew tre indictment, using the wording in the old law. So actually it started off there were four counts involving two occasions. Then later on we did go back, and there were four counts and probably a fifth count mentioning habitual criminal statue. Does trat answer the question?

Q Yes. Was this first indictment, number 150-095?

A I don't know the numbers, but hte first indictment would have a lower number, and the second indictment wouldha rave a higher serial number.

Q Could you outline the steps you took in prosecuting the case from the return of the indictment to the grand jury until he was convicted in the Jefferson Circuit Court for trafficking in Heroin and being a habitual criminal?

A All right. I can remember this specifically because, first of all, it was Rose's first case, and there were 150 indictments rendered as a result of tre revision of these two offenses; and this was the firat case tried of all those indictments; and to explain what happened is that about a year before this, tre practice in the Commonwealth Attorney's office was to indict everybody that was

eligible as a habitual at the time they were taken to the grand jury originally; in other words, if they were habitual candidates, we indicted them initally.

Well, because of the meetings with the defense attorneys and Academy of Justice and everybody else, they were complaining that our office . . .

MS. KING: Object, Your Honor.

THE COURT: I'm going to let it go in for this time. Go ahead

MR. O'CONNER: The reason that our office quit doing it initially is that the defense bar complained when they were isdicted as a habitual. At the outset, the judges would set the bonds much higher, and they couldn't get their clients out of jail; and they consider that a real grievance.

So in order not - and what was happening, a lot of these habituals were being dropped and, you know, plea negotiations to a lesser charge, and the people had that high bond. So we adopted the policy in all cases, not this case.

The people were indicted in the new charge. Then they came up for arraignment. Then it was set for a pre-trial conference. which was approximately something like two weeks on Thursday or Friday after ethey were arraigned, and my practice was to, at that pre-trial confernce,

before we talked about plea negotiatiohs, was to inform defense counsel of the man's record, advising trat his man was eligible as a habitual criminal and to advise him at that point that if the case were tried, tren we would, sometime before the trial, go back to the grand jury and indict trem; and I kept this - I did this before I talked about plea negotiations because I recognized the problem we had in case law about using this as a lever or anythng.

Now ifyou're not going to indict them at all at the outset and youre gong to do it thisway, this is tre only way know to it is to tell them that you intend to do it and do it in every case. that's what I did with all cases I handled,not just John Gaston. any cases I handled that wasn't indicted originally as a habitual criminal, I advised them of them of tre fact that I intended to do it before I discussed plea negotiations.

Okay. At the pretrial conference,John Randolph Gaston had ten years probated over his head from, I believe, a previous drug charge. Because of the volume of cases, 160 new cases, we were a part-time staff at that time, and because these were on top of our regular docket we were trying to move some of these cases.

Tre offer I made was qulte liberal. I offered to go ahead and revoke on his old ten-year sentence. He would have been eligible for parole in ayear and then let the new ten-year sentence be probated over his head after he was out of the penitentiary; but before I even talked about the offer with Rose Shipp or any of them, I advised

them I intended, like in all cases, to someitme before the thing was tried, to have them indicated as a habitual, if we had to try the case because it was my position that if you have to try a case and not just his case but all cases, that you should go in and take the best hold.

fair or not, but I feel as a prosecutor, I should take advantage of the laws that the legislature has passed and intends for me to enforce, that I did dothat in all cases, not just this case.

Oky. Now what I did after that, I think they turned it down at the pre-trial conference, my offer, because Rose told me, and I think Mr. Gaston always maintained that he just frankly didn't do what he was accused of do-

Now I don't know whether that they considered this ing, and I probably waited. You see, to get a new habitual criminal indictment means we haae to take the same officer, go back to the grand jury again, testify, and get the new indictment.

Well, rather than do all this work in these cases and burden the grand jury and everybody with it, I usually waited until something like a month before trial, and I would always ask the attorneys all along if I saw them in the hall, you think your man wants to take that offer. When it started getting close to trial and I was convinced it was going to be tried, I would go ahead and go up and submit the thing and have him indicted on habitual criminal.

O'Connor - Cross - King; The Court

As far as my practice is concerned, everbody that is a canidate for habitual criminal knew at the initial pretrial conference that trey were a canidate, and we intended to do it before we talked about plea negotiations. As far as I was concerned, during that trial, John Randolph Gaston could have said, I want to take the offer, and he could have taken tre offer. The fact that we indicted him as a habitual, I figure if the jury wants to find him guilty, fine. I didn't care one way or the otrer . To this day, I don't care one way or the other.

Q You didn't seek it was practice not to seek an indictment on the recidivist count until you, in fact, determined the fact it was going to go to trial.

A Right. It was my point to advise them initially before any plea negotiations at all and alsothey would know, but not to exercise a useless gesture until you were sure you were gong to rave to go to trial; and I don't - the Court can conclude any way they want to. I would just say it had nothing to do with the fact that he wouldn't take the offer. It had to do with in all cases that I handle that if it was going to be tried, Ifelt like probably the best practice was to do it initially, but because the office was accommaditing the defense counsel as far as bonds, the next best thing we could do is just advise them at the outset what we were going to do and not con nect that in anv way with the plea bargaining.

You have any other questions about it?

CROSS-EXAMINATION BY MS. KING

MS. KING: But, in fact, Mr. O'Connor, is it not correct, Mr. Gaston was told if he did not plead guilty, he would be charged under the Habitual Criminal Act?

MR. O'Cosnor: Not in those words, but I mean it was a fact thaat if the case were tried, not if he - it wasn't a matter if he didn't plead guilty. It was a matter if the case went to trial, it would be tried under all the existing laws of the State of Kentucky. As any other case would, and it didn't have anything to do with John. He was told before he ever entertd into plea negotiations.

Q And he still refused to plead guilty, and he wanted to go forware with the trial?

A Yes. He maistained he was innocent, and I don't blame him.

Q And then after that point in time, you returned to the grand jury?

A Yeah. I think I saw Rose on occasion, and I would ask her, are we going to have to try the case; and she would say, yeah, we're probably going to have to try it, and we were real busy, and I would wait until the time, hoping that possibly, you know, maybe Mr. Gaston would change his mind; and I think probably it ended up going up and submitting it to the grand jury about two or three

weeks probably before the trial date so that, for two reasons. One, if I waited until the last minute, then they wouldn't increase the bond on habitual.

We were thinking in terms of bond because we were being criticized by taking these habituals, and the judges over there made the bonds a lot higher on habitual than they did the straight-out charge.

Q Now if Mr. Gaston had not asserted his right to a trial, then you would not have obtaned a new indictment charging him with . . .

A There would have been no need to. He would either have asserted his right to trial, or he would have accepted the offer I made. I mean, there was no question that if he had taken the offer, he could have done that during the trial even if the habitualhe was being tried on the habitual indictment. He could have done that while the jury was out as far as I was concerned.

Q There was no event that occurred between the issuance of the first indictment and the issuance of the second indictment that influenced your decision with the exception of the fact that Mr. Gaston insisted on going to trial, is that correct?

A No, nothing happened in there. What convinced me to indict him as a habitual was that it was his record; and even before the pre-trial conference, I was going to indict him as a habitual if the case was going to be tried.

If he didn't want an offer, didn't want to listen to an offer, we really didn't talk about an offer too much, quite frankly, because Ms. Shipp made it clear to me he didn't want any kind of an offer. He was innocent.

Q There was nothing prohibiting you from indicting Mr. Gaston under the Haabitual Criminal Act at the time of the first indictment, was there?

A Well, there was nothing prohibiting the office. Let me explain. Well, can I explain the answer?

THE COURT: Sure.

MR. O'Connor You see, I am in the Trial Divison. We had one attorney that handled the grand jury, I never saw the case until they indicted him, and they were arrainged, and they were assigned to me.

If you ask me what I would rather do myself. I would rather indict them all isitially, and that is what we are doing now. We're back to that because we think that's the better practice. We now have a Career Criminal Division all full time

Back then we were operating a lot differently than we are now; but if you ask me, if I handled the case initallyand I would have my druthers, I would have indicted him as a habitual at the time it was up to the grand jury and save all the trouble.

MS. KING: In other words, somebody else made

the decision not to indict him under the habitual, is that what you are telling us?

A The office. Mr. Schroering made the total decision not to indict any of them initially under the habitual because of the - trying to accommodate the defense bar on the bond issue.

Q All right. Now you waited for approximately two weeks after you were told that it was definitely going to to go to trial, you waited approximately two weeks after that point in time in order to make sure it was going before you returned an dasked for nother indictment?

A No, I'll tell you what probably happened. At that particular time, I was part time. I was going through a divorce, and I handled all the cases, all the cases in that court over there, and I was busy; and like, whatever would occur to me to do, why I chose the particular time was probably just to hurry up and get it done. We had to go back and schedule them before the grand jury again, and I probably waited until I was at least relatively certain there was a necessity to indict him as a habitual. I didn't feel like if he - I didn't feel like he should necessarily make up his mind that morning at the pre-trial totake the offer. He might have wanted to think it over for a while. He might change his mind, but I was ronestly hoping that he would because I felt like personally myself that we were going to make the case, and we made every one of those cases. We didn't lose a one that I know of.

Q But it was after the plea negotiations failed that you then procured the indictment charging him with the habitual?

A Yes, after they failed, and I was sure it was going to trial, and that is when I did do the acts, the mechanics of going and getting the habitual criminal indictment,but my mind and my decision to do it was assigned to me.

Q You indicated earlier, Mr. O'Connor, that you informed everyone at the pre-trial that a habitual criminal act could be brought against him?

A No, that it would be brought against him if tried.

Q If tried.

A What I would do, I would most of the time, the defense attorneys were not familiar with their defendant's records. The first thing I would do before we even talked about plea negotiations is open up the file and say to Rose, Rose, here's your man's recrd. Look at it. Here is how many felonies he's been convicted of. He's got ten years on the shelf. He is eligible as an habitual criminal; and if tried, I am going to go back and get the indictment as an habitual crimisal. I felt like, in fairness to the deftnse attorneys, if their client lies to them and they don't know, so they should know.

If we're not doing them all initially, as soon as I receive contact with the defense attorney, the only thing I

know to do to try to keep it away from vindictiveness is to tell them at the outset and be uniform, and that is what I did with all cases.

Q You indicated also in your testimony that this is what you would do as a normal rule.

Do you remember specifically what you did in the case of John Randolph Gaston?

A Yes I do.

Randolph Gaston?

Q What specifically did you do in the case of John we had the first pre-trial conference. That would normally be the first time when I would see the defense attorney, and that is when we normally in those days talked about plea negotiations.

A The thing I can't remember specifically is when sonally was in the room or just Rose. I think he might have been in the room, but I have handled so many cases, I don't know

The first thing I did was open up my file and we've got little three-by-five slips of paper with the record on it and F.B.I. rap sheets. The first thing I did was to show Rose his record because I thought maybe she doesn't realize how extensive it is. It's been my experience that people accused of crimes don't like sometimes to be honest

and frank with their own attorneys. Ifeel like the first thing I should do is tell them.

The first thing I did is show her what his record was, told her trat I intender to indict him as an habitual criminal if we dos't work something out. Now you can imply what you want from that, but I didn't, you know it's not like if you don't take the offer, we're going to whip this over your head. It's going to be in every case. When it's tried, we're going to try on all the existing laws of the State of Kentucky. I am not going to pick out one person and try him on the habitualand pick out another person and not try him.

Q Now did you hear Ms. Shipp testifying eatlier that she had met you out in the hall prior to the pre-trial?

A I heard her; I don't recall it.

Q You don't recall the meeting, or you don't recall whether or not there was a meeting?

A I don't recall whether I saw her out in the hall that morning before the pre-trial. It wouldn't have been unlikely that I would have seen her. We would have had eight or ten cases during this particular time. We had like 10 cases for pre-trial that day, and court started at 10:00, and most of the lawyers were out in the hall, and that's tre only place to go smoke a cigarette, and I'm sure that it wouldn't have been unusal for her to speak to me or speak to me about the case.

Whatever discussion we had would have been informal, but I don't think I would have told her anything differently than what I told her at the conference except to me. If I see you at coffee and I say one thing but when I see you at a conference, that's when I'm speaking offically as far as my position is considered.

MS. KING: I have no further questions at this time.

MR. GEOGHEGAN: I have no redirect.

THE COURT: Mr. O'Connor, just one question.

MR. O'CONNOR: Yes, Judge.

Q How long a period elapsed between the two inictments approxmently?

A I know this. Between the original indictment and the time it was scheduled to be tried, we obtained the habitual criminal indictment about two or three weeks before the original trial date; and it was tried on the regular date that the first indictment was assigned to, Your Honor. I don't know. It could have been several months, but I didn't, you know, it didn't cause a delay in the trial date.

Q And during this time, after the pre-trial conference up to the date of trial, did you have any contact with Ms. Shipp or with Mr. Gaston?

A I don't think Mr. Gaston. I'm sure probably

whenever I would see Rose, I would say things like, are we going to have to try that case, or do you think your man will take the offer because I would wait until the end because I felt like if he decided to take the offer, why go up there and make the officers come back up there and make the grand jury listen to it again and type up a new indictment and make the clerk's office set up a new file? Why do it if you don't have to, and I would usually wait pretty late to do it because most of the time, especially when a man has ten years over his head, which we could have revoked very easily. As a matter of fact, I didn't even move on the revocation. I probably could have set the revocation down for an immediate hearing, brought the undercover police officers in and revoked that ten years over his head right away, but I figured, let's wait and see.

I felt like really the offer I made was generous, and I felt like I could even be criticized for making the offer, but I just felt like that was the offer I felt like was right to make, and I wanted to give him time to take it if he wanted to.

Q He was serving a ten-year sentence, but he was on probation, suspended sentence?

A Well, no. He was at the time they bought the drugs from him apparently he was not out from the penitentiary, but he had ten years sentence over his head.

Q He was on parole?

A He was on probation.

Q Probation.

A And we could have had a revocation hearing on the probation and probably revoked him immediately on the ten-year sentence, but I felt like, why do that, let's make the offer and let him make up his mind. If he doesn't want it, let's try the case and see where we stand.

Q I didn't quite understand some of the lingo. If your offer had been accepted, what would it have meant to him?

A What it would have meant is that I would have revoked the teen years probated sentence that he had over his head.

Q Yes sir.

A That would have made him eligible for parile in a year. Then he could have taken ten years on the new case that was before the habitual was brought down. He could have taken ten years probated over his head for a period of five years after he was released on the revocation. What it would have really done is been sent back on the ten-year sentence, been eligible for parole in a year andhao ten years over his head for a period of five years after he was released from the peniteniary.

THE COURT: All right. Thank you. Anything further? Thank you, sir.

Mr. Geoghegan, anything further?

MR. GEOGHEGAN: I have no further witnesses, Your Honor

O'Connor—Court

THE COURT: Ms. King, any rebuttal witnesses?

MS. KING: No, Your Honor. I have no rebuttal witnesses.

THE COURT: All right. Now do either of you have a copy of the Hayes' opinion?

MS. KING: Yes, Your Honor.

THE COURT: All right. If I might look at it.

(The opinion is given to the Court)

THE COURT: To refresh my memory. Thank yo.u All right. Mls. King, anything you wish to say at this time?

MS. KING: If it may please the Court, I would like to make a few statements.

THE COURT: Yes ma'am.

MS. KING: In regard to how I review this evidence in what has transpired, that in my questionlng of Mr.O' Connor, I attempted to use the language as much as possible that was used in the Hayes case. For instance, the fact that no event occurred between the issuance of the first indictment and the issuance of the second indictment

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to influence his decision; the fact that something further was used only at the point in time when Mr. Gaston asserted his rights to trial.

Your Honor has my copy, and I had those portions underlined, but I did use the language as closely as possible in my questioning; and Mr. O'Connor answered that basically this was brought because Mr. Gaston did not go to trial. Now he's also indicated to the Court that he had no vindictiveness in his heart and there well may be, but individual vindictiveness is not necessary. I think prosecutorial vlndictiveness, if it was the policy of the office to lay low on the indictment and then at a later time if the person refused to go along with the, quote, deal, to slap a habitual upon him at that time.

Now I don't know anythng about the practice of the defense bar here in Louisville or any other place w th the exception of the places that I practice; but I think that the ultimate effect is the same. The characterizations by Mr. O'Connor are not important. The effect was the same.

Mr. Gaston was indicted upon four counts. He asserted his innocence; and after he asserted his innocence, Mr. O'Connor then returned to the grand jury and asked for an indictment under the habitual. As a matter of fact, Mr. O'Connor indicated that it was very late in the game when he was absolutely certain that it was going to trial that he took this particular action.

Now there is a little bit of conflict in the testimony

in regard to a meeting that may or may not have taken place. Mr. O'Connor indicates that he does not remember meeting Ms. Shipp out in the hall beforehand. He does'nt even remember if it took place or not, but Ms. Shipp indicated definitely there was a deal proposed before pretrial ever took plact and that Mr. O'Connor knew that the was not going to be accepted or at least he had been told. that

Your Honor heard testimony from Mr. Gaston indicating that he was threatened. In essence, he was told what was going to happen. He understood what was going to happen and nonetheless asserted his rights, and it is my very firm belief that this case falls on all fours with the Hayes case with the excepton of the characterization used by Mr. O'Connor.

I refer the Court to a footsote on page 2. Bindictiveness was never used in this case. in the Hayes case, by the prosecutor. He never said, I am beng vindictive; my office is being vindictive; but the footnote indicates that it is indeed what happentd. The testimony here today also indicates that that is what happened. Worded perhaps a little bit differently, but the inconvenience, the difficulty, the consumption of time taking something to trial was in my estimation was what was apparently the problem.

* * * * * * *

REMAINING PORTIONS OF STATEMENTS OF COUNSEL MAY BE FOUND IN THE RECORD BELOW.

THEY ARE NOT PERTINENT HERE

RENDERED: February 7, 1975

COURT OF APPEALS OF KENTUCKY
No. 74-198

JOHN RANDOLPH GASTON — **APPELLANT**

V. APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, FIRST DIVISION
HONORABLE S. RUSH NICHOLSON, JUDGE
No. 150410

COMMONWEALTH OF KENTUCKY — **APPELLEE**

MEMORANDUM OPINION PER CURIAM
AFFIRMING

It is the opinion of this Court that:

1. There was no showing of arbitrary or discriminatory application of the habitual criminal statute; the use of the threat to indict under that statute was within the proper scope of plea bargaining. See Cunningham v. Commonwealth, Ky., 447 S.W. 2d 81.

2. The appellant suffered no prejudice to his substantial rights from the failure of the trial court to require the Commonwealth to disclose the identity and whereabouts of the informant, and to produce the appellant knew the identity of the informant and the appellant knew tre identity of the informant and her whereabouts shortly before the trial.

3. There is nothing to indicate that the reading of the original indictment by the Commonwealth, containing four counts, followed by a dismissal by the Commonwealth of two of those counts, was in pursuance of a plan to prejudice the jury by informing them of two alleged offenses that the Commonwealth had no intention to prosecute.

4. There was no showing that the jury did in fact separate on one occasion; the only showing is that the court on that occasion did not admonish the jury not to separate.

The judgment is affirmed.

All concur.

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ATTORNEY FOR APPELLEE:

Ed W. Hancock
Attorney General

Mary Ann Delaney
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UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JOHN RANDOLPH GASTON, **Petitioner,**	
	CIVIL ACTION
HENRY E. COWAN, Superintendent of Kentucky State Penitentiary, **Respondent,**	**No. C 75-0268 L(A)**

MEMORANDUM OPINION

This action was submitted to the Court for decision following an evidentiary hearing which was held pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit.

The petitioner, on Octcber 1, 1973, was arrainged following the return of an indictment against him for the offense of trafficking in a Schedule 1 controlled substance. At that time, he was on parole from the service of a ten-year sentence which had previousley been imposed upon him b ya Kentucky court. He and his attorney, Mrs. Rose Shipp, and Mr. Edward L. O'Connor, the Assistant Commonwealth's Attorney, at some time after arraignment attended a pretrial conference at which Mr. O'Connor revealed to Mrs. Shipp the prior felony record of tre petitioner. Mr. O'Connor also offered to petitioner and his counsel a ten-year sentence on the ch-

arge made in the indictment, and the offer was rejected, petitioner maintaining his innocence.

Mr. O'Connor made known to petitioner and his counsel that if the plea offer was not accepted, the Commonwealth would seek an indictment under the Habitual Criminal Act. On occasions after the pre-trial conference, Mr. O'Cosnor and Mrs. Shipp would meet casually and Mr. O.Connor would inquire as to whether or not petitioner was still going to trial. When he received word that petitioner insisted on going to trial on the chargt of trafficking in a Schedule 1 controlled substance, an indictment was secured under the Habitual Criminal Act, and subsequently the petitioner was tried and found guilty under both indictments.

Mr. O'Connor stated that the defense attorneys of the Jefferson County Bar complained about the practice of the Commonwealth in obtaining indictments simultaneously for both a substantive charge and a habitual criminal charge, inasmuch as this practice resulted in increased bonds for their clients. Thereupon, Mr. O'Connor asserts that the Commonwealth's Attorney decided not to file the indictments at the same time, so that defendants could get the benefit of a lesser bond under the substantive offense charged and bt free to consult with their attorneys concerning plea-bargaining, as well as other matters associated with their defense. If the plea-bargaining was unsuccessful, then the Commonwealth's Attorney would seek a habitual criminal offender indictment.

This court is controlled by the opinios of the United

v. Cowan, # 76-1409 decided December 30,1976. In that case, petitioner was indicted for forgery of a check. After arraignment, a pretrial conference was held, during which the prosecutor agreed to recommend a five-year sentence if the petitioner would plead guilty. Petitioner was warned that if he did not plead guilty, he would be charged under the Habitual Criminal Statute, then K.R.S. 431.190, which has since been repealed. See,also, K.R.S. 532.080, the new recidivist statue. Petitioner refused to plead guilty and insisted on a trial, whereupon the prosecutor obtained a new indictment charging the petitioner under the Habitual Criminal Act, based on the forgery as a third offense. Petitioner was convicted and received a mandatory life sentence.

Judge McCree, now Solictor General McCree, writing the opinion for the court, cited *North Carolina v. Pearce,* 395 U.S. 711 (1961) and *Blackledge v. Perry,* 417 U.S. 21 (1974) as authority for the rule that defendants who are asserting prrocedural rights must be treated in a way that avoids any suggestion of vindictive or retaliatory motive. *Pearce, Supra,* holds that a defendant may not be subjected to a more severe penaliy on a retrial, after a successful collateral attack on his conviction, and *Blackledge, supra,* holds that a petitioner may not be prosecuted on a felony indictment growing out of the same facts as those alleged against him in a misdemeanor proecution, where he had assertted his right to a trial *de novo* on appeal. See, also,*United States v. Ruesga-Martinez,* 534 F. 2d 1367 (9th Cir. 1976) to the same effect.

On p. 5 of the opinion, it is stated as follows: "We

> hold that a similar potential for impermissable vindictiveness exists when a prosecutir is allowed to bring an habitual offender indictment against a defendant who has refused to plead guilty to an indictment for the same unenhanced substantive offense . . . When a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the intesests of the state are served by sot seeking more serious charges. CF. *United States v. Johnson,* 537 F. 2d 1170 (4th Cir. 1976). Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness. Under these circumstances, the prosecutor should be required to justify his action."
>
> *Hayes v. Cowan,supra.*

The case at bar is almost exactly on all fours with *Hayes, supra,* except for the assertion made by the prosecution attorney that the reason for not obtaining simultaneous indictments under the substantive offense charged and the recidivist statute is to give defendants more freedom pending the resolution of the plea-bargaining respect to the substantive offense. This evidenc ewas, to a certain extent, based os hearsav, but no doubt reflects the reasons for the policy folliwed by the Commonwealth Attorney's office. While the testimony offered by Mr. O'Connor might be the basis for a belief that the policy of the Commonwealth Attorney's office was not vindictive,

the holding in *Hayes, supra,* and the language used on p. 5 of the opinion would seem to warrant a decisios that the policy of the Commonwealth Attorney's office was uncon- situation. As in *Hayes, supra,* the prosecutor does not assert that any event occurred between the issuance of the *first* indictment and the issuance of the second to in- influence his decision to obtain the second indictment, except for petitioner's insistence to a trial. Also, as is *Hayes, supra,* there is no indication that the prosecutor, had he thought such an indictment proper, could not have included the habitual criminal in the original indictment.

We understand the Commonwealth has applied to the United States Supreme Court for a writ of certiorari in*Hayes, supra,* the application being made in March of this year. There is, ofcourse, no way of knowing whether the Court will grant the writ or not, and, therefore, we feel bound by the decision of the Sixth Circut in *Hayes, supra,* and will order petitioner's discharge under the life imprisonment sentence, provided, however, that he shall remain confined under the sentence imposed for the crime of trafficking in a Schedule 1 controlled substance.

Judgment has been entered in accordance with this opinion this day.

Dated 5/26/77

/s/ Charles M. Allen
Unlted States District Judge
cc: Counsel of Record

ENTERED
May 26, 1977
Jesse W. Grider, Clerk
By Deputy Clerk
/s/ B. Hawkins

IN THE UNITED STATE DISTRICT COURT FOR HE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

JOHN RANDOLPH GASTON, **Petitioner,**	
V.	**CIVIL ACTION**
HENRY E. COWAN, Superintendent of Kentucky State Penitentiary, **Respondent,**	**No. C 75-0268 L(A)**

JUDGMENT

The court, having held an evidentiary hearing in the above-styled action in accordance with the mandate of the United States Court of Appeals for the Sixth Circuit, and having entered its memorandum opinion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the petitioner, John Randolph Gaston, be discharged under the life imprisonment sentence, provided, however, that he shall remain confined under the sentence imposed for the crime of trafficking in a Schedule 1 controlled substance.

This is a final and appealable judgement, and there is no just cause for delay.

Dated 5/26/77

cc: Counsel of Record

/s/ Charles M. Allen
United States District Judge

ENTERED
May 26, 1977
Jesse W. Grider, Clerk
By Deputy Clerk
/s/ B. Hawkins

No. 77-3390

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN RANDOLPH GASTON, **Petitioner-Appellee**	
V.	**CIVIL ACTION**
HENRY E. COWAN, Superintendent of Kentucky State Penitentiary, **Defendant-Appellant**	**No. C 75-0268 L(A)**

Before: WEICK, EDWARDS, and ENGLE, Circuit Judges

Upon consideration of petitioner-appellee's motion to affirm and all other documents submitted in relation thereto,.

It appears to this Court that the District Court did not abuse its discretion when it found that the prosecutor's practice of obtaining habitual criminal indictments against defendants who refuse to plea bargain and who insists on going to trial, is violative of this Court's decision in *Hayes v. Cowan,* 547 F. 2d 42 (6th Cir. 1976) cert. granted ——— U.S. ———; 45 U.S.L.W. 3785 (June 6, 1677) wherein this Court ruled that due process was offended when a prosecutor unjustifiably placed the defendant in fear of retalitory actios after the defendant refused to plea bargain and insisted on his right to a trial.

Accordingly, it is ORDERED that the motion to affirm be and hereby is *granted.*

ENTERED BY ORDER OF THE COURT

/s/ John Hehman

Clerk

77-947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Miscellaneous No. _____

DONALD E. BORDENKIRCHER,
SUPERINTENDENT, KENTUCKY
STATE PENITENTIARY — PETITIONER

V.

JOHN RANDOLPH GASTON — RESPONDENT

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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I

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

Miscellaneous No. _____

DONALD E. BORDENKIRCHER,
SUPERINTENDENT, KENTUCKY
STATE PENITENTIARY — PETITIONER

V.

JOHN RANDOLPH GASTON — RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondent, John Randolph Gaston, respectfully prays that a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Sixth Circuit be denied.

OPINION BELOW

The opinion below is correctly stated by Petitioner.

JURISDICTION

The jurisdiction is correctly stated by Petitioner.

QUESTIONS PRESENTED

I. WHETHER THIS COURT'S DETERMINATION IN *BORDENKIRCHER V. HAYES*, ___ U.S. ___ (NO. 76-1334, DECIDED JANUARY 18, 1978) THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT VIOLATED WHEN A STATE PROSECUTOR CARRIES OUT A THREAT MADE DURING PLEA NEGOTIATIONS TO HAVE THE ACCUSED REINDICTED ON MORE SERIOUS CHARGES ON WHICH HE IS PLAINLY SUBJECT TO PROSECUTION IF HE DOES NOT PLEAD GUILTY TO THE OFFENSE WITH WHICH HE WAS ORIGINALLY CHARGED, (Pp. 3-9) SHOULD NOT ALTER THE FINAL DISPOSITION OF THE CASE AT BAR.

II. WHETHER THE APPLICATION OF THE HABITUAL CRIMINAL STATUTE AFTER FAILURE OF PLEA NEGOTIATIONS IS A DENIAL OF EQUAL PROTECTION WHEN THE STATUTE IS APPLIED ONLY TO THOSE INDIVIDUALS WHO REFUSE THE PROSECUTOR'S PLEA BARGAIN.

NOTICE

Although the decision below was based on *Hayes v. Cowan*, 547 F.2d 42 (6th Cir, 1976), certiorari granted sub nom *Bordenkircher v. Hayes*,(No. 76-1334, ___ U.S. ___ decided January 18, 1978), the lower court could have reached the same result by considering the question of equal protection. Thus, the reversal of *Hayes*, i.d., should not alter the final disposition of the case at bar.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are correctly stated by Petitioner.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

The nature of the case is correctly stated by Petitioner.

II. DECISION OF THE COURT BELOW.

The decision of the court below is correctly stated by Petitioner.

III. COURSE OF THE PROCEEDINGS.

The course of proceedings is correctly stated by Petitioner. Further, in his original application for a writ of habeas corpus in the United States District Court for the Western District of Kentucky, Respondent claimed a denial of equal protection based on the Commonwealth's selective application of the habitual criminal statute. The district court entered a judgment denying application. The decision was appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit vacated judgment and remanded the case to the district court to determine whether the prosecutor threatened Gaston with seeking an indictment under the habitual criminal statute. The Sixth Circuit did not address itself to the issue of equal protection.

REASONS FOR DENYING THE WRIT

This Court's determination in *Bordenkircher v. Hayes*, (No. 76-1334, decided January 18, 1978) that the Due Process Clause of the Fourteenth Amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges on which he is plainly subject to prosecution if he does not plead guilty to the offense with which he was originally charged, (Pp. 3-9) should not alter the final disposition of the case at bar.

This is so because the application of a habitual criminal statute after failure of plea negotiations is a denial of equal protection when such statute is applied only to those individuals who refuse the prosecutor's plea bargain.

I.

THIS COURT'S DETERMINATION IN *BORDENKIRCHER V. HAYES*, (NO. 76-1334, DECIDED JANUARY 18, 1978) THAT THE DUE

PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT VIOLATED WHEN A STATE PROSECUTOR CARRIES OUT A THREAT MADE DURING PLEA NEGOTIATIONS TO HAVE THE ACCUSED REINDICTED ON MORE SERIOUS CHARGES ON WHICH HE IS PLAINLY SUBJECT TO PROSECUTION IF HE DOES NOT PLEAD GUILTY TO THE OFFENSE WITH WHICH HE WAS ORIGINALLY CHARGED, (Pp. 3-9) SHOULD NOT ALTER THE FINAL DISPOSITION OF THE CASE AT BAR.

Gaston respectfully disagrees with this Court's decision in *Bordenkircher v. Hayes,* (No. 76-1334, decided January 18, 1978) for three reasons. First, a defendant who is initially indicted on all charges has ample opportunity to assess his situation and decide what course of action would be best for him. When an indictment is threatened during the heat of plea bargaining, such an opportunity does not so clearly exist. Unlike *Brady v. United States,* 397 U.S. 742, at page 754, (1970) there is a "hazard of impulsive and improvident response".

Secondly, this kind of behavior chills the exercise of basic constitutional rights by other defendants who look to past prosecutional actions in order to make decisions regarding their own cases. Other defendants, faced with completely

different charges might well be fearful that a prosecutor would, "up the ante" if they assert their constitutional rights. This fear might well exist whether or not a particular defendant is actually eligible for additional charges. This would have a chilling effect on due precess and "...insure that only the most hardy defendants will brave the hazards ..." of asserting constitutional rights. *Blackledge v. Perry*, 417 U.S. 21 at 27-28 (1974).

Thirdly, contrary to this Court's expression in *Hayes*, supra, Gaston believes that allowing additional counts after the refusal of a plea bargain invites unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged. *Hayes*, supra at page 8, citing *Blackledge v. Allison*, supra, 431 U.S. at 76. Traditional plea-bargaining where certain charges are dismissed in exchange for pleas to other charges is done in open court.

The "deal" is on the record. A judge officiates to make certain the defendant's plea is voluntary. Threats of additional charges take place outside the presence of the court and do not generally appear on the record. It is difficult to assess the amount of pressure which has been brought to bear.

Even if *Hayes*, supra, has been correctly decided, it should not control the decision in the case sub judice. First, in *Hayes* there was nothing in the record to indicate how much time *Hayes* had to consider the offer. In Gaston's case, Gaston contends the offer was made to him only once (appendix, page 12a). His attorney recalled that Mr. Gaston had approximately one week to think over his decision (appendix, page 7a). In any event, Mr. Gaston did not have a reasonable amount of time to consider his decision. Whether or not the prosecutor felt he would follow through on the original offer even while the jury was out is immaterial. Such feelings were apparently not conveyed to defense counsel (appendix, page 22a).

Secondly, Gaston has consistently raised the question of whether or not he was denied equal protection under the law. This question was not answered by the Sixth Circuit Court of Appeals. Gaston believes this question should be answered in the affirmative, rendering moot the question of Due Process which was raised in *Bordenkircher v. Hayes*, supra.

II.

THE APPLICATION OF A HABITUAL CRIMINAL STATUTE AFTER FAILURE OF PLEA NEGOTIATIONS IS A DENIAL OF EQUAL PROTECTION WHEN SUCH STATUTE IS APPLIED ONLY TO THOSE INDIVIDUALS WHO REFUSE THE PROSECUTOR'S PLEA BARGAIN.

The Commonwealth Attorney's office placed defendants eligible for prosecution under the Habitual Criminal Act into two separate classifications. One class consisted of defendants who did not insist upon a trial. Those individuals were not proceeded against as habitual criminals. The other class of defendants consisted of persons who asserted their constitutional right to a trial. These individuals were routinely

indicted as habitual criminals. A similar kind of classification was noted in *Shapiro v. Thompson,* 394 U.S. 618 (1968). In *Shapiro,* a residency requirement for Welfare recipients was struck down by this Court because;

> In moving from state to state...appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. *Id* at 634.

Shapiro can be distinguished from the case at hand because it deals with a statute which was defective on its face. Gaston's case deals with a statute which was applied in a discriminating manner. However, any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356 (1918). If state laws which serve to penalize the exercise of constitutional rights are examined by the standard of "compelling governmental interest", the application of the laws must be examined by the same standard.

Gaston is aware of this Court's dicta in *Hayes*, supra, that...

> To hold that a prosecutor's desire to induce a guilty plea is an "unjustifiable standard" which, like race or religion, may play no part in his changing decision, would contradict the very premises that underlie the concept of plea bargaining itself. (Page 8)

However, when actual classifications based solely on defendant's ammenability to plea bargaining are created as in the case sub judice, it is no longer a "conscious exercise of some selectivity in enforcement". *Hayes*, supra, citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962). It becomes an exercise of invidious discrimination. To excuse this kind of prosecutorial behavior is to invite recidivist statutes designed to coerce repeat offenders and save the expenses of trial with no thought to the fairness of the penalty imposed.

CONCLUSION

The Respondent respectfully requests this Honorable Court to deny Writ of Certiorari.

Respectfully submitted,

Kathleen C. King

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PROOF OF SERVICE

I, Kathleen C. King, Counsel for Respondent, hereby certify that three (3) copies of the foregoing brief were mailed, postage prepaid, to Hon. George M. Geoghegan, Jr., Counsel for Petitioner, Capitol Building, Frankfort, Kentucky 40601, this 10 day of March, 1978.

Kathleen C. King

KATHLEEN C. KING
COUNSEL FOR RESPONDENT